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NOT FOR PUBLICATION

SEP 08 2009

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIAM JENSEN COTTRELL,

Defendant - Appellant.

No. 05-50307

D.C. No. CR-04-00279-RGK

AMENDED MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
Gary Klausner, District Judge, Presiding

Argued and Submitted October 18, 2006
Pasadena, California

Before: PREGERSON, GOULD, and CLIFTON, Circuit Judges.

William Jensen Cottrell appeals his convictions for conspiracy to commit arson in violation of 18 U.S.C. § 844(n) and for seven counts of arson in violation of 18 U.S.C. § 844(i). He also appeals his 100-month sentence. We affirm the

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

conspiracy conviction, vacate the arson convictions and the sentence, and remand for further proceedings.

A. Sufficiency of the evidence

In considering Cottrell's challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution. *United States v. Daychild*, 357 F.3d 1082, 1096 & n.22 (9th Cir. 2004). There was sufficient evidence for the jury to find Cottrell guilty beyond a reasonable doubt on all counts for which he was convicted. Evidence established that Cottrell obtained maps to the car dealerships and used his car to transport the group throughout the night. Cottrell was at the gas station with the others when bottles were filled with gasoline. He acknowledged actively participating in the spray-painting vandalism. He was present when the first SUV was set on fire with a Molotov cocktail and remained with the group thereafter. He was continuously present throughout the vandalism of the car dealerships, including the last dealership where eight SUVs were set on fire with Molotov cocktails. Witnesses testified that Cottrell described his involvement to them afterwards in ways that appeared to take credit for the attacks. Cottrell sent several emails to a newspaper claiming responsibility for the attacks. In the face of this substantial evidence of his involvement, the jury's guilty verdict was clearly based on sufficient evidence.

B. Expert testimony on Asperger's Syndrome

The proposed expert testimony on Asperger's Syndrome was not relevant to the charge of conspiracy. A conspirator may be held liable for a crime committed by another co-conspirator, provided that the acts making up the crime were reasonably foreseeable and were carried out in furtherance of the conspiracy, even though the conspirator did not participate in the actual commission. *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946). On the issue of foreseeability, the law requires the application of an objective standard. *See United States v. Montgomery*, 150 F.3d 983, 998-99 (9th Cir. 1998) (“[O]bjective knowledge is sufficient to connect a defendant to a conspiracy . . .”). An objective standard is presumably used because in criminal law there is generally an “unwillingness to vary legal norms with the individual’s capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable.” *United States v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992) (quoting Model Penal Code, § 2.09, cmt. 2), *superseded by regulation on other grounds as stated in United States v. Martinez-Martinez*, 369 F.3d 1076, 1089-90 (9th Cir. 2004). Blindness may be taken into account in determining criminal responsibility, for example, because it limits the facts available to the defendant, but a condition like Asperger’s, which affects only the defendant’s ability to draw inferences from facts that he perceives,

does not qualify. The proposed Asperger's evidence did not speak to that objective standard. Whether Cottrell personally believed that his companions would not set any more fires after the first one – and thus failed to foresee that his companions might set fire to the SUVs at the dealership – was not the relevant question. A defendant's gullibility does not generally excuse his criminal liability if it does not rise to a mental defense or capacity issue. The Asperger's evidence would not have established such a defense, so it was not an abuse of discretion to exclude it with regard to that conviction.

The arson counts presented different issues, however. The government sought to convict Cottrell under alternative theories, as a principal or as an aider and abetter. The jury's verdict did not specify which theory it adopted, so we must recognize the possibility that it found Cottrell guilty of aiding and abetting.

“Aiding and abetting is a specific intent crime.” *United States v. Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997). The evidence must establish that the defendant “‘associate[d] himself with the venture, that he participate[d] in it as something he wish[ed] to bring about, and that he [sought] by his action to make it succeed.’” *United States v. Smith*, 832 F.2d 1167, 1170 (9th Cir. 1987) (alterations in original) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)). Because aiding and abetting requires specific intent, the government's inclusion of

the aiding and abetting charges placed Cottrell's subjective intent at issue in a way that the conspiracy charge did not. *See United States v. Sayetsitty*, 107 F.3d 1405, 1411-12 (9th Cir. 1997) (determining that the district court's failure to instruct on voluntary intoxication as a defense to aiding and abetting is plain error); *see also United States v. Sutcliffe*, 505 F.3d 944, 961-62 (9th Cir. 2007) (suggesting a specific intent to threaten involves the determination of the defendant's subjective intent and not the determination of intent applying an objective standard). To the extent that the Asperger's evidence was aimed at defeating an inference of Cottrell's intent from the circumstances, it was relevant and could have assisted the jury's determination of whether Cottrell had the specific intent required for aiding and abetting. The exclusion of that evidence was thus an abuse of discretion. The arson convictions, which might have been affected by that evidence, must be vacated.

C. Conclusion

We affirm defendant's conviction for conspiracy. We vacate the convictions for arson, based on the improper exclusion of evidence that was relevant to support Cottrell's defense to the aiding and abetting theory of liability. Because sufficient evidence was presented by the government to support convictions on those counts,

the government may elect to retry them. We vacate the sentence imposed on all counts, including the conspiracy conviction, and remand for further proceedings.

AFFIRMED in part; VACATED in part; REMANDED for further proceedings.

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United States v. Cottrell, 05-50307

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PREGERSON, Circuit Judge, affirming in part and dissenting in part:

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I concur in the majority's conclusion that we vacate the 100-month sentence imposed on all counts. I agree that we reverse the convictions for arson based on the improper exclusion of evidence that the defendant was afflicted with Asperger's Syndrome. Evidence of Asperger's Syndrome could have assisted the jury to determine whether Cottrell had the specific intent required for aiding and abetting the commission of arson.

I disagree, however, that evidence that Cottrell was suffering from Asperger's Syndrome was irrelevant to assisting the jury to determine whether Cottrell participated in a conspiracy to commit arson. I agree with the majority that we use an objective standard to determine whether the criminal acts that fell within the ambit of the conspiracy were reasonably foreseeable and were carried out in furtherance of the conspiracy, *absent* a showing that the defendant suffers from a disability that is "both gross and verifiable." *United States v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992). But I submit that Asperger's Syndrome meets these two requirements. Cottrell's perception of what is reasonably foreseeable could be impaired by his disability. Accordingly, evidence of the complexity, severity, and extent of Asperger's Syndrome suffered by Cottrell could have assisted the jury to determine whether arson was a reasonably foreseeable act of the conspiracy.

Therefore, I dissent in part.

United States Court of Appeals for the Ninth Circuit
Office of the Clerk
95 Seventh Street; San Francisco, California 94103

General Information
Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue seven calendar days after the expiration of the time for filing a petition for rehearing or seven calendar days from the denial of a petition for rehearing, unless the court directs otherwise. To file a motion for stay of mandate, file it electronically via the appellate ECF system or by paper with an original and four copies of the motion.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -4)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - ▶ Consideration by the full court is necessary to secure or maintain uniformity of the court's decisions; or
 - ▶ The proceeding involves a question of exceptional importance; or
 - ▶ The opinion directly conflicts with an existing opinion by another

court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- ▶ A petition for rehearing may be filed within fourteen (14) days after entry of judgment. Fed. R. App. P. 40(a)(1).
- ▶ If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- ▶ If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- ▶ *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- ▶ An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.
- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11.

- If a petition is filed electronically via the appellate ECF system, no paper copies are required.
- If filing a petition for panel rehearing by paper, submit an original and 3 copies.
- If filing a petition for rehearing en banc by paper, submit an original and 50 copies.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information.

Attorney's Fees

- Circuit Rule 39-1 describes the content and due dates for attorney fee applications.
- All relevant forms are available on our website www.ca9.uscourts.gov or by telephoning (415) 355-7806.

Petition for Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourtus.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court."

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
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Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees **cannot** be requested on this form.

* If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.

** Costs per page may not exceed .10 or actual cost, whichever is less. Circuit Rule 39-1.

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk